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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
ROBERT BONDS, CIRCUIT COURT JUDGE

Appellate Case No. 2021-001337

IN THE MATTER OF: Estate of Paul Brandon Barringer II

Hampton Barringer Luzak, ... Appellant,

v.

Merrill U. Barringer, ... Respondent,

FINAL BRIEF OF APPELLANT

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NATURE OF THE ACTION

These complex cases arise out of the undisclosed transfer of controlling stock in Coastal Forest Resources Company ("CFRC"), a privately-held and family-controlled corporation incorporated in Virginia and headquartered in Florida. CFRC is not a party to this case. The disputed stock transfer involves a purported gift of CFRC voting stock in late 2012 from Paul Barringer, the now-deceased husband of defendant Merrill U. Barringer ("Ms. Barringer") and the parent, along with Ms. Barringer, of appellant Hampton B. Luzak ("Ms. Luzak"), defendant Merrill B. Light, and non-party Victor Barringer. At the time of the stock transfer, Paul Barringer was suffering from Alzheimer's disease. The purported gift from the ailing Paul Barringer to Merrill Light resulted in Ms. Light ostensibly owning 51% of the voting stock in CFRC, thereby giving her control over the corporation. Prior to the 2012 voting stock transfer, Paul Barringer and Ms. Barringer had always treated their two daughters equally in terms of gifts of various assets including stock in CFRC. The purported transfer by Paul Barringer of the controlling interest in CFRC exclusively to Merrill Light represented a dramatic change in the pattern of family giving by Paul Barringer.

In related and consolidated actions filed in 2016, Ms. Luzak seeks damages from her sister, Merrill Light and her sister's husband and defendant Randy Light[1] for the improper transfer of controlling stock and other assets from Paul Barringer's revocable trust to Merrill Light on the grounds of intentional interference with inheritance, civil conspiracy, and other related causes of action. Ms. Luzak has also asserted claims to rescind the stock transfer and to set aside amendments to the will and revocable trust of Paul Barringer occurring after the onset of Paul Barringer's dementia on the grounds of undue influence and fraud committed by the

[1] Randy Light died on March 16, 2020.

defendants Merrill and Randy Light on Paul Barringer, as well as lack of mental capacity of Paul Barringer. Ms. Luzak named Ms. Barringer as a defendant in Ms. Barringer's capacity as personal representative of the estate of Paul Barringer.

In 2019 Ms. Luzak filed this action naming her mother Merrill U. Barringer individually as a defendant asserting causes of action for intentional interference with inheritance, two causes of action involving the purported testamentary powers of appointment associated with Paul Barringer's trusts, attorney fees and costs, and civil conspiracy. Ms. Barringer argued that the decedent Paul Barringer (Decedent) had given her a special testamentary power of appointment over assets in his revocable trust — the critical asset being voting control stock — and moved for summary judgment on Ms. Luzak's second and third causes of action involving Ms. Barringer's purported testamentary powers of appointment. In those causes of action, Ms. Luzak argued that (1) Ms. Barringer does not have a power to appoint voting stock owned by Paul Barringer in the company, and (2) even if she does, she was precluded from such an appointment because of a promise by her to Paul Barringer, enforceable by (a) a binding contract not to revoke her will that did not exercise the power, (b) a promise based on her fiduciary and confidential relationship, and/or (c) equitable/promissory estoppel.

In an order filed on November 4, 2020, the Honorable Carmen Mullen denied Ms. Barringer's motion for summary judgment.[2] Ms. Barringer did not file a motion to reconsider. Judge Mullen recused herself from the case on February 19, 2021. On June 14, 2021, Ms. Barringer once again sought to obtain summary judgment on the second and third causes of action. This time around, on August 20, 2021, the Honorable Robert Bonds granted Ms.

[2] While denying Ms. Barringer's motion for summary judgment, Judge Mullen subsequently ordered the bifurcation and trial of the second and third causes of action. That bifurcation order is being separately appealed (see Appellate Case Nos. 2021-001022 and 2021-000837).

Barringer's motion for summary judgment on the very same causes of action that were before Judge Mullen when she previously denied summary judgment.

By granting Ms. Barringer's motion for summary judgment on the second and third causes of action in the 2019 cases, Judge Bonds, who had only recently been appointed to preside over this case on July 23, 2021, effectively reversed the prior denial of the very same summary judgment motion, and the very same arguments, by Judge Mullen, who had been presiding over this case, designated as complex, and who had been deeply involved in all aspects of this complex case, for approximately four years. Judge Bonds reversed Judge Mullen even though *Ms. Luzak had no less evidence*[3] for this repeat summary judgment motion than she had when Judge Mullen denied exactly the same (prior) summary judgment motion on November 4, 2020. Nor has the law changed since November 4, 2020. This is a summary judgment motion: all Ms. Luzak has to do is produce a sufficient amount of evidence — a minimal amount under the law — to survive summary judgment. If Ms. Luzak had a sufficient amount of evidence to create a genuine issue of material fact in the prior summary judgment, she has a sufficient amount now, without the need to second-guess Judge Mullen.[4] According to Judge Bonds, Ms.

[3] Ms. Luzak actually had more evidence in her favor for this repeat summary judgment motion than in the prior summary judgment action, as discussed below, especially related to the testimony of attorneys Neill McBryde and John Jolley.

[4] Ms. Luzak, in the interests of economy and efficiency, incorporated all of her responses, memoranda, arguments, affidavits, and exhibits filed September 28, 2020 in response to Ms. Barringer's first summary judgment motion denied by Judge Mullen on November 4, 2020 into her response to Ms. Barringer's second set of summary judgment motions on the second and third causes of action that Ms. Luzak submitted to the trial court on August 6, 2021 along with eight additional exhibits. Ms. Luzak's memorandum in the second set of summary judgment motions addressed the relevant issues in part by reference to the filings in the first summary judgment motion, including exhibit references. Included in Ms. Luzak's filed exhibits from the first summary judgment motion and incorporated into her response to the second summary judgment motions were 40 exhibits of estate planning related documents showing the constant, unchanging pattern of equal treatment with the frequent participation of and no resistance from Ms. Barringer, 26 medical-related documents showing Paul Barringer's mental problems and decline, affidavits from Hampton Luzak and her husband Kevin Luzak (former CEO of CFRC) showing Paul Barringer's unchanging intent for equal treatment and the lack of any resistance from Ms. Barringer, affidavits from estate planners Richard Allen and James Hardin (deposed by Ms. Barringer) debunking statements made by McBryde, communications from Defendant Randy Light and from those occupying positions as officer, director, and general

Luzak failed to demonstrate even a mere scintilla of evidence in support of the claims on which summary judgment was granted. Judge Mullen, on the other hand, specifically pointed out in her order dated November 4, 2020 that "there is evidence in support of Ms. Luzak's two causes of action at issue in the summary judgment motion, creating a genuine issue of material fact for jury determination." Ms. Luzak certainly had not withdrawn any of her evidence, so the genuine issues of material fact on both causes of action that existed on November 4, 2020 still existed on August 20, 2021.[5]

Moreover, Judge Bonds' order expressly identifies evidence that <u>does</u> create a genuine issue of material fact that precludes summary judgment. On page 6 of the order granting summary judgment, Judge Bonds stated: "At most, these documents suggest that, during a certain time period, Mr. and Mrs. Barringer treated their children equally in the past and <u>intended or planned to treat them (*sic)* children equally with respect to certain assets in the future."</u> (Emphasis added).

Similarly, the trial judge's analysis of S.C. Code §62-2-701 suggests that the fact of the reciprocal wills of the Barringers supposedly served as the only evidence of contractual intent, even while acknowledging a page earlier evidence that did create a genuine issue of material fact. Ms. Luzak has never argued, as implied in the trial judge's order, that the 1998 reciprocal

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counsel of the company, and excerpts from Ms. Barringer's deposition. Also included in Ms. Luzak's exhibits for the second set of summary judgment motions were additional affidavits from Hampton Luzak and Kevin Luzak providing evidence of the lack of intent by Paul Barringer to give Ms. Barringer a power over voting stock, the existence of a contract not to exercise any such power of appointment, and a promise not to exercise any such power of appointment; in addition, Ms. Luzak included excerpts of the depositions of McBryde and Jolley that impeached their recollection and reliability. In opposition, Ms. Barringer *failed to provide any personal affidavit* to dispute any of the facts shown by Ms. Luzak's evidence in either set of summary judgment motions. Unless otherwise specified, all references herein to exhibits (*e.g.*,"Ex. ___" or "Ex. ___, Attchm't ___") shall be to the documents submitted to the trial court by Ms. Luzak as part of her summary judgment responses of September 28, 2020 and August 6, 2021.)

[5] Judge Bonds' order focused solely on "documents" as evidence, ignoring the testimony of witnesses on these very issues.

wills constituted the sole evidence of a contract or promise. Ms. Luzak produced multiple examples of other indications of decedent's intent in addition to those reciprocal wills. The court necessarily had to ignore all of this evidence in order to grant summary judgment based solely on what "the documents" showed. In short, the trial judge opted to *weigh* the evidence instead of simply looking to see if evidence existed (by inference or otherwise) to support Ms. Luzak's claims.

Judge Bonds cited two cases as authority for being able to consider again the exact same summary judgment motion denied by Judge Mullen. The first, *Weil v. Weil,* 299 S.C. 84, 382 S.E.2d 471 (Ct. App. 1989), is clearly inapposite. In his order, Judge Bonds quoted a sentence from *Weil* that demonstrates that it is inapposite: "[A] judge deciding a case on the merits is not bound by a prior order of another judge denying summary judgment." *Id.* at 89, 382 S.E.2d at 473. In *Weil*, a family court judge issued an order after a merits hearing with testimony, despite an earlier ruling from another judge denying summary judgment. Unlike the present case, the party in *Weil* was not seeking two bites of the summary judgment apple. Although Ms. Luzak in this case is confident she would prevail if given the opportunity to have a trial, she understands that a jury may disagree with her arguments at trial; however, Judge Bonds' summary judgment order, coming to the opposite conclusion of Judge Mullen, precludes Ms. Luzak from even having a trial, unlike *Weil*. Judge Mullen's denial of the prior summary judgment motion would have allowed Ms. Luzak to have a trial — regardless of the outcome. The second cited case, *Smith v. Breedlove*, 377 S.C. 415, 662 S.E.2d 67 (2008), did allow a second summary judgment, two years after the first, when substantial discovery occurred after the first summary judgment. Importantly, in *Breedlove*, no depositions had been taken before the first summary judgment. Summary judgment prior to completion of discovery is inappropriate. *Gionan v. Tenet*

Healthsystems of Hilton Head Inc., 383 S.C. 48, 677 S.E.2d 32 (Ct. App. 2005). At the second summary judgment motion in *Breedlove,* discovery had been completed.

In contrast, Judge Mullen ordered that a material issue of fact existed. That material issue of fact did not disappear by the time of the second summary judgment, nor did the three depositions cited by Judge Bonds eliminate any issue of material fact or reduce the evidence in Ms. Luzak's favor to less than a scintilla. In fact, the depositions created additional genuine issues of fact and further evidence of the facts that were disputed at the time of Judge Mullen's order.

As discussed more fully below, the deposition of Neil McBryde, who drafted the 1998 wills and trusts of the Barringers, was devastating to Ms. Barringer.[6] He had filed two sworn affidavits for the first summary judgment motion, and his deposition testimony contradicted his sworn affidavits as well as numerous other facts asserted by Ms. Barringer — not to mention calling into question his recollection and reliability. Thus, McBryde's testimony added nothing to Ms. Barringer's existing evidence from the prior summary judgment, but weakened the facts Ms. Barringer had relied on in the first summary judgment motion, therefore adding to the dispute over material facts at the time of the instant summary judgment.

As Judge Bonds noted, both parties submitted deposition testimony from John Jolley, who had nothing to do with the 1998 documents: that both parties submitted excerpts from his deposition further demonstrates that the "additional discovery" created more issues of fact, not fewer. The third deposition cited by Judge Bonds was that of Kevin Luzak, but the Court did not

[6] Ms. Barringer's arguments, as well as Judge Bonds' order, focused on the 1998 estate planning documents, even though (a) Judge Price granted respondent Merrill Light's motion for summary judgment as to the validity of Mr. Barringer's February 28, 2012 Will and Trust (appeal pending at Case No. 2021-000837) and (b) Respondents additionally continue to assert the validity of Mr. Barringer's purported Wills and Trusts executed in 2014 and 2015, either of which would revoke any earlier Will and Trust, including the 1998 documents.

indicate how or why his deposition made a difference. Kevin and Hampton Luzak had submitted to the trial court three separate affidavits[7] – one each for Ms. Barringer's first summary judgment motion, Merrill Light's first summary judgment motion, and Ms. Barringer's second summary judgment motion – all of which provided evidence that would defeat a summary judgment motion.

One other issue raised by the *Breedlove* case was the confirmation that, in a summary judgment, a "trial court, must view all ambiguities, conclusions, and all inferences arising in and from the evidence in a light most favorable to the non-moving party…." Judge Bonds provided no indication in his order that he did so.[8] Judge Bonds failed to consider the rule that, even if the facts are undisputed (which Ms. Luzak does not acknowledge), summary judgment is inappropriate if the conclusions or inferences of fact to be drawn from those undisputed facts are disputed. *Hoard v. Roper Hospital*, 377 S.C. 503, 661 S.E.2d 113 (Ct. App. 2008).

Ms. Luzak has contended throughout this litigation that Paul Barringer never intended to give Ms. Barringer the power to appoint such voting stock and, even if his valid estate planning documents conveyed such a power, then Ms. Barringer cannot exercise any such power because she entered into a valid contract agreeing not to exercise any such power of appointment, as to

[7] Judge Bonds' order mistakenly states that neither Kevin Luzak's affidavit nor Hampton Luzak's affidavit "suggest that a promise was made during [family] meetings . . . ." (ROA Vol. I, p. 68). All of their affidavits do exactly that. Under *Chapman*, discussed below, a promise can be inferred, even from silence. The affidavits, inter alia, aver that Ms. Barringer never indicated that she would do anything other than comply with Paul Barringer's intentions for equal control of his company. (ROA Vol. XI, pp. 4617-25). This alone satisfied the requirement of *Chapman*. The affidavits of the Luzaks filed in response to the three aforementioned summary judgment motions are hereafter referred to as "Affid. of ____. Luzak filed ___/___/202__."

[8] In his order, Judge Bonds referred to a post-hearing email submitting four documents previously submitted. Ms. Luzak notes that these documents were submitted because she understood that Judge Bonds had requested them at the hearing.

the voting stock, and/or she made an enforceable promise in a fiduciary or confidential relationship not to exercise any such power of appointment, and/or she was estopped.[9]

STATEMENT OF ISSUES ON APPEAL

1. **Did the trial court err in ruling by summary judgment that decedent Paul B. Barringer gave Defendant Merrill Barringer a special testamentary power of appointment over controlling voting stock in his legacy company?**

2. **Did the trial court err in ruling by summary judgment that Defendant Merrill Barringer was not precluded from exercising any special testamentary power of appointment over controlling voting stock in the legacy company because of a promise related to a fiduciary and/or confidential relationship?**

3. **Did the trial court err in ruling by summary judgment that Defendant Merrill Barringer was not precluded from exercising any special testamentary power of appointment over controlling voting stock in the legacy company because of promissory and/or equitable estoppel?**

4. **Did the trial court err in ruling by summary judgment that there was insufficient evidence that Defendant Merrill Barringer was precluded from exercising any special testamentary power of appointment over controlling voting stock in the legacy company due to a contract not to revoke her 1998 will which did not exercise any such power — *i.e.*, due to a contract not to exercise any special testamentary power of appointment over voting stock?**

5. **Did the trial court err in ruling by summary judgment despite the inability to obtain testimony from Defendant Merrill Barringer?**

STATEMENT OF THE CASE

These cases[10] center on the undisclosed transfer of controlling stock in CFRC from the revocable trust of the ailing Paul Barringer[11] to Merrill Light's revocable trust in late 2012,

[9] Despite the court's questioning the ability of Ms. Luzak to assert alternative theories about the existence of the power of appointment and, if so, about a promise not to exercise it, she is certainly entitled to pursue alternate theories, all stemming reasonably from the same set of facts. See Rule 8(a), SCRCP ("Relief in the alternative or of several different types may be demanded.")

[10] While four (4) different lawsuits were filed, the cases were designated as complex and assigned to Judge Carmen Mullen, who consolidated the cases. (ROA Vol. I, pp. 7-11 and 20-24).

thereby giving Ms. Light control over the corporation. Also at issue in this case has been the validity of the Will and Revocable Trust of Paul Barringer[12] executed on December 4, 1998 and the purported new Wills and re-stated Trusts dated February 28, 2012, July 20, 2012,[13] June 12, 2014, and February 5, 2015. Ms. Luzak seeks damages from her sister, defendant Merrill Light, and her sister's husband, defendant Randy Light, for the improper transfer of controlling stock and other assets from Paul Barringer's name pursuant to claims for fraud, conversion, quantum meruit/unjust enrichment, breach of fiduciary duty, intentional interference with inheritancy and gifts, and civil conspiracy. Ms. Luzak also seeks to unwind the putative transfers and estate planning documents of Paul Barringer from February 28, 2012 and afterwards. Ms. Luzak further seeks a constructive and/or resulting trust over misappropriated property resulting from the stock transfer of her father's shares in CFRC to Defendant Merrill Light, rescission of the stock transfer, and other related relief. (ROA Vol. I, pp. 213-85). In addition, Ms. Luzak asserts claims to set aside amendments to the Will and Revocable Trust of Paul B. Barringer on the grounds of undue influence committed by Merrill and Randy Light on Paul Barringer, lack of mental capacity of Paul Barringer, and other related causes of action.[14]

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[11] Mr. Barringer's first medical records on this topic were dated December, 2011, when he reported to his physician that he had been suffering from cognitive difficulty for "the last one or two years." (ROA Vol. V, p. 2103).

[12] Mr. Barringer was a long-time resident of Hilton Head at the time of his death in 2016. South Carolina litigation originated in Beaufort County Probate Court, prior to Mr. Barringer's death, when Ms. Luzak sought the appointment of a guardian and conservator for her father, who was suffering from dementia diagnosed as Alzheimer's disease. *In re: Matter of Paul B. Barringer II*, Case Nos. 2016-GC-07-00006 and 00007.

[13] Paul Barringer executed and restated his revocable trust on July 20, 2012 but did not sign a new Will on that date.

[14] Altogether the Amended Complaint in case number 2016-CP-07-1919 contains 19 causes of action for: setting aside the Will of Paul Barringer for lack of mental capacity, undue influence and mistake; setting aside *inter vivos* transfers of Paul Barringer for lack of mental capacity, undue influence and mistake; setting aside purported *inter vivos* trust amendments by Paul Barringer for lack of mental capacity, undue influence and mistake; setting aside putative transfers of personal property by Paul Barringer to his *inter vivos* trust; fraud; conversion; quantum meruit /unjust enrichment; constructive trust; resulting trust; breach of fiduciary duty; intentional interference with inheritancy and gifts; attorney fees and costs; and civil conspiracy.

After Mr. Barringer's death in May of 2016, Ms. Luzak originally filed her complaint in this action in the Beaufort County Probate Court on August 26, 2016 and petitioned for removal to the Court of Common Pleas the same day. By order dated September 1, 2016 the Probate Court ordered the removal of Ms. Luzak's complaint and all related proceedings to the Beaufort County Court of Common Pleas. On September 7, 2016 Ms. Luzak filed a nearly identical complaint in the Beaufort County Court of Common Pleas in order to protect the trial court's jurisdiction. The two actions were consolidated by Order of Consolidation of Actions by Consent entered May 19, 2017. (ROA Vol. I, pp. 7-11).

Ms. Luzak filed related actions on May 28, 2019 naming her mother Merrill U. Barringer individually as a defendant asserting causes of action for intentional interference with inheritance, two causes of action involving the purported testamentary powers of appointment associated with Decedent's trusts, attorney fees and costs, and civil conspiracy. ("the 2019 cases") (ROA Vol. I, p. 359 – Vol. II, p. 514). Those actions were consolidated for purposes of discovery and trial with case number 2016-CP-07-1919 by order of consolidation filed December 3, 2019. (ROA Vol. I, pp. 20-24).

Ms. Luzak's second and third causes of action regarding the purported testamentary powers of appointment focus on whether Ms. Barringer has the power to appoint by will the controlling voting stock in Paul B. Barringer's legacy company, CFRC. Ms. Barringer has contended that she has a testamentary power of appointment to redirect Mr. Barringer's CFRC voting stock to Ms. Light. Ms. Luzak has contended throughout this litigation that Paul Barringer never intended to give Ms. Barringer the power to appoint such voting stock and, even if his valid estate planning documents conveyed such a power, then Ms. Barringer cannot exercise any such power because she entered into a valid contract agreeing not to exercise any

such power of appointment, as to the voting stock, and/or she made an enforceable promise in a fiduciary or confidential relationship not to exercise any such power of appointment, and/or she was estopped.

On March 20, 2020, Ms. Barringer filed a motion for summary judgment seeking dismissal of Ms. Luzak's second and third causes of action in the 2019 cases.[15] That motion was heard on October 15, 2020 and denied by Judge Mullen on November 4, 2020. (ROA Vol. I, pp. 29-31). Ms. Barringer did not file a motion to reconsider.

On September 10, 2020 Merrill Light filed her first Motion for Summary Judgment to dismiss all of Ms. Luzak's causes of action against her. (ROA Vol. II, pp. 837-38). The Honorable Carmen Mullen denied Ms. Light's first summary judgment motion on December 30, 2020.

On May 14, 2021 Merrill Light filed a second summary judgment motion before the Honorable Bentley Price seeking a ruling that Paul Barringer's February 28, 2012 Will and Trust are valid documents in opposition to Ms. Luzak's seventh, eighth, and ninth causes of action to set aside the February 28, 2012 Will and Trust for lack of mental capacity, undue influence and mistake. (ROA Vol. IX, pp. 3889-956). Ms. Light's second summary judgment motion did not seek to have any of the later Wills and Trusts declared valid. On July 6, 2021, Judge Price granted Merrill Light's second motion for summary judgment, ruling that Mr. Barringer's February 28, 2012 Will and Trust were valid. (ROA Vol. I, pp. 35-54).

On June 14, 2021, Ms. Barringer again filed two motions for summary judgment on the second and third causes of action — involving the powers of appointment — in the 2019 cases.

[15] Ms. Barringer in her motion asked for summary judgment on all five of Ms. Luzak's causes of action (ROA Vol. II, pp. 585-88), but by her Memorandum in Support of her Motion for Summary Judgment filed September 8, 2020, Ms. Barringer withdrew her request for summary judgment except as to Ms. Luzak's second and third causes of action. (ROA Vol. II, pp. 712-13).

(ROA Vol. IX, pp. 3957-4080). Those motions were heard on August 10, 2021 by the Honorable Robert Bonds, who granted the motions for summary judgment on August 20, 2021. (ROA Vol. I, pp. 57-72). Ms. Luzak filed a motion to reconsider on August 30, 2021, which was heard on October 7, 2021 before Judge Bonds, who denied the motion to reconsider in a Form 4 order filed on October 8, 2021. (ROA Vol. I, pp. 73-75).

Ms. Luzak filed and served her Notice of Appeal on November 8, 2021 of the summary judgment on the second and third causes of action in the 2019 cases. (ROA Vol. XII, pp. 5257-78).

STATEMENT OF FACTS

CFRC is one of the largest privately held companies in the timber and lumber industries in the country. (See: https://coastalplywood.com/) CFRC's predecessor company (Coastal Lumber Company) was founded by Paul Barringer's father and successfully developed by the decedent Paul Barringer. Respondent Merrill Barringer is his surviving spouse. Ms. Luzak and Ms. Light are the two daughters of Paul Barringer and Merrill Barringer. Victor Barringer is their son, but he is not a party to this action since he was advanced his inheritance before the relevant time.

Around 1989, Paul Barringer transferred an equal number of voting shares in Coastal Lumber Company to appellant Hampton Luzak, respondent Merrill Light, and their brother Victor Barringer. Paul Barringer owned at most 11% of the voting stock of the company. On September 21, 1998, Decedent Paul Barringer, individually and as co-trustee of his mother's testamentary trust, along with Merrill Light, Hampton Luzak and Victor Barringer,[16] entered into a Barringer Family Voting Agreement under Decedent Paul Barringer's direction. (ROA Vol. III,

[16] Victor Barringer at his own request later surrendered his voting stock (and a majority of his ownership) in 2004 in exchange for interests in other entities upon the restructuring of the company that fostered the formation of CFRC.

pp. 1140-48). At the time of the Barringer Family Voting Agreement, Paul Barringer had not kept enough stock in Coastal Lumber Company to affect control of the company long-term. Coastal Lumber Company was subsequently reorganized into CFRC in 2004.

On December 4, 1998, Mr. and Ms. Barringer executed reciprocal wills and trusts. The essence of those instruments that is relevant to this case is that Mr. Barringer's will poured the residue of his estate into a revocable trust that he simultaneously created. Mr. Barringer was the sole trustee of that trust until February 28, 2012, and while the trust provided a beneficial interest for Ms. Barringer during her lifetime after the death of Mr. Barringer, it also purported to give her a special power of appointment to appoint the beneficiaries of the trust upon her death, with that power limited to designation of Mr. Barringer's descendants as beneficiaries. Ms. Barringer's will declined to exercise any appointment, which would have included the power of attorney that Mr. Barringer gave to her at the same time. Pursuant to their unified estate plan and their agreement to treat the children equally, Ms. Barringer's will and trust were a mirror image of Mr. Barringer's. Mr. and Ms. Barringer's estate plan provided beneficially for each other and then provided for the children equally.

After the reorganization in 2004 and as a result of gifts from their father, Paul Barringer, Hampton Luzak and her sister, Merrill Light, each owned the same amount of voting stock in CFRC, 31.2%. The remaining shares were owned 20% by their father and 17.6% by an outside investing family, the Congers. (ROA Vol. I, p. 154). The company also issued non-voting stock to the shareholders, and Paul Barringer gifted all of his non-voting stock to his children. (ROA Vol. V, pp. 2044-45, ⁋⁋ 7-8; ROA Vol. V, pp. 2069-70, ⁋⁋ 5-6). Prior to 2013 Ms. Luzak and her sister Merrill Light each owned approximately 37.1% of the non-voting stock, their brother Victor Barringer owned 8.1% (collectively the "Barringer Siblings"), and the Conger family

(who were unrelated to the Barringer/Luzak/Light families) owned the remaining 17.6%. Paul Barringer's gifts of both voting and non-voting stock to his two daughters had been made in equal amounts so that each daughter owned the same number of shares. (*Id.* ROA Vol. VII, p. 2868). Paul Barringer retained ownership of 20% of the voting stock so that he could effectively control CFRC by aligning with either daughter as the need may arise.

In approximately 1993, Paul Barringer placed Ms. Luzak's husband, Kevin Luzak, on the board of directors of CFRC's predecessor company. (ROA Vol. VIII, p. 3489, ¶ 2). In 2004, Paul Barringer hired him as the president. (*Id*.) By 2009, Paul Barringer had stepped aside as chief executive officer with Kevin Luzak taking his place as CEO of CFRC. (ROA Vol. I, p. 217, ¶ 13; ROA Vol. I, p. 291, ¶ 13).

The medical records show that as early as 2010, Paul Barringer began experiencing issues with onset of dementia including progressive memory loss and behavioral changes with brain atrophy. (ROA Vol. V, p. 2103). By 2011, family members and co-workers were e-mailing among each other their concerns about Paul Barringer's mental health. These communications included an e-mail from defendant Randy Light. (ROA Vol. III, pp. 1428-29). Before becoming afflicted with Alzheimer's disease, Paul Barringer did not allow Randy Light to work for CFRC even though Paul Barringer was never told that Randy Light had run at least two Texas-based real estate companies he owned into bankruptcy and was many millions of dollars in debt from those failed ventures. (*Id*. ROA Vol. VIII, pp. 3633-35).[17]

[17] These matters are not included in the designations of appellant. They are public court records, referenced here for purposes of citation in the brief in accordance with Rule 208(b)(1)(C), SCACR, and can be provided to the Court pursuant to Rule 212, SCACR. SW Loan OO, LP countercl., *J. Randolph Light Jr. et al. v. Stillwater National Bank and Trust Company et al.*, Case No. 12-0384-A (Tex.Dist.Ct. Smith County (7th Dist.) 2012); Appellant's Brief, Victor *Lissiak Jr. v. SW Loan OO, L.P.*, Appellate Case No. 12-14-00344-CV (Tex.Civ.App. Tyler (12th Dist.) 2014); *In re: The Stretford at the Cascades L.P.*, Case No. 12-60465 (Bank. E.D.Tex. 2012) (petition signed by Randy Light June 4, 2012).

By December 2011, Paul Barringer had begun seeking medical assistance for cognitive impairment. (See, *e.g.*, ROA Vol. V, p. 2103). In 2012, Paul Barringer and his wife continued to reside at their long-time residence in Hilton Head Island, South Carolina. Merrill Light and Randy Light also lived in Hilton Head Island. The Luzaks resided in New York City at this time. (See ROA Vol. I, p. 266, ¶ 134); ROA Vol. I, p. 350, ¶ 134).

After Paul Barringer sought treatment for memory deficits, on February 28, 2012 Merrill Light secretly became co-trustee with Paul Barringer of his purported revocable trust drafted by Merrill Light's long-time personal lawyer, John Jolley. (ROA Vol. III, pp. 1155-84). Under that trust, Merrill Light could act independently of Paul Barringer and, subject to fiduciary duties to the trust, control the assets of the trust by herself. No one told Ms. Luzak of this change, (*Id.*; ROA Vol. VIII, pp. 3524-25, ¶ 24), and so began the subterfuge of seizing control of CFRC without disclosing anything to Ms. Luzak or doing anything to alert her of the scheme. The subterfuge and scheme commenced when family and colleagues noticed Mr. Barringer's mental state, and all relevant documents executed by Mr. Barringer were executed after he had been diagnosed with dementia.

From May 2 through May 4, 2012 Paul Barringer was hospitalized in Savannah, Georgia for issues related to mental confusion and urinary tract infection. An examining neurologist noted Paul Barringer had trouble following two-step commands such as touching his right hand to his left ear and showing two fingers upon request and opined that he had confusion with history of urinary retention and apparent aphasia. (ROA Vol. V, p. 2114 and Vol. VIII, p. 3576). On May 30, 2012 he was diagnosed with early onset Alzheimer's disease by a leading neurologist at the Medical University of South Carolina. (ROA Vol. V, p. 2124).

On May 11, 2012, a few days after he had trouble following simple commands such as touching his ear with his hand, Paul Barringer purportedly executed a stock certificate transferring his voting stock to himself as trustee of his revocable trust. The share certificate was signed by Ms. Luzak's husband Kevin Luzak as president of CFRC, but the share certificate did not reflect Merrill Light as a co-trustee/shareholder and did not disclose to Kevin Luzak that Merrill Light had been made a co-trustee of Paul Barringer's revocable trust. It did not even reflect that Paul Barringer was a "co-trustee;" it simply stated that he was "trustee" of the trust. (ROA Vol. IX, pp. 3718 and 3720; ROA Vol. V, pp. 2076-77, ⁋⁋ 29-31). Rather than identifying both Paul Barringer and Merrill Light as co-trustees on the very stock certificate that Kevin Luzak would review and sign and thereby revealing the amendment of Mr. Barringer's trust to make Ms. Light co-trustee, the stock certificate simply showed that Mr., Barringer was the trustee. The truth remained hidden and the subterfuge continued. This was consistent with Merrill Light's growing influence and control over her father and his CFRC stock.

During the spring of 2012 Paul Barringer had been suffering from extensive confusion and memory lapses regarding company affairs, such as forgetting he directed the sale of the company jet, forgetting the company made a significant commercial real estate investment in Virginia, and forgetting about important board presentations that company management, including Ms. Luzak's husband Kevin Luzak, had made to the board of directors. (ROA Vol. VIII, pp. 3493-96, ⁋⁋ 12-19 and 3499-502, ⁋⁋ 32-38; ROA Vol. VIII, pp. 3520-22, ⁋⁋ 10-16 and 3526-30, ⁋⁋ 28-37; ROA Vol. VIII, p. 3585). Mr. Barringer also became confused about prior board and executive management committee presentation materials Kevin Luzak had given the board and corporate officers in the past 15 months when Merrill Light re-submitted the materials to her father. (ROA Vol. VIII, pp. 3501-02, ⁋⁋ 36-37).

When Paul Barringer was re-introduced to the prior board presentation materials by Merrill Light, he did not recall the prior company meetings. He did not remember praising Kevin for the presentation and the work he had done. He did not remember endorsing the business plan presented by Kevin. A year earlier, when the board was initially presented with the materials, Mr. Barringer had been involved in the board presentations and complimented Kevin Luzak on the soundness of the plans at that time. (*Id*. at ROA Vol. VIII, pp. 3501-02, ¶ 36; ROA Vol. VIII, p. 3667).

But with dementia robbing him of his memory and his ability to reason with the clarity of yesteryear and to protect himself and those dear to him, Paul Barringer fell prey to the influence and control of the defendants, and the Alzheimer's primed him for the manipulation by those wanting control of the family legacy business: Merrill Light and Randy Light, aided by Ms. Barringer. This, and the events of 2012 and later, were set against the backdrop of Randy Light's personal exposure on millions of dollars of liability for his failed business ventures in Texas. (SW Loan OO, LP countercl., *supra*, at ¶ 25; (ROA Vol. XVII, p. 7594, lines 10-15 and p. 7595, line 19-p. 7596, line 8).

With Ms. Light now ostensibly established as a co-trustee of Mr. Barringer's Revocable Trust (February 28, 2012) and empowered to act alone, and with Mr. Barringer's voting stock purportedly transferred into that trust and subject to her control (May 11, 2012), it was time to exercise that control. It was time to move the Luzaks out and Randy Light in. On June 28, 2012, the board of directors, spearheaded by defendant Merrill Light, fired Ms. Luzak's husband, Kevin Luzak, as chief executive officer of CFRC in a special telephonic board meeting. (ROA Vol. IX, pp. 3815-17). Decedent Paul Barringer, after receiving coaching from the defendants in the room with him (defendants Merrill Light and Ms. Barringer), voted in favor of Kevin

Luzak's removal as did Merrill Light.[18] (*Id.*; *id.* at ROA Vol. IX, p. 3790; ROA Vol. I, p. 158, ¶ 2,). Ms. Barringer was not a shareholder of CFRC; she was not a director of CFRC; and she was not an officer of CFRC. Despite having had nothing to do with the company, either as a shareholder, director, or officer, Ms. Barringer attended that meeting for the stated purpose of ensuring that Mr. Barringer did not forget to fire Kevin Luzak. (ROA Vol. VIII, p. 3638); *id*. (ROA Vol. VIII, p. 3659). That meeting was at the law office of John Jolley, longtime lawyers for Merrill and Randy Light, and who did not undertake to prepare any legal documents for the Barringers until 6 months earlier.

On July 20, 2012 Paul Barringer ostensibly changed his revocable trust by leaving his CFRC voting stock at his death to Merrill Light. Mr. Jolley also prepared that amendment. The CFRC voting stock aside, Ms. Luzak remained an equal beneficiary with her siblings. (ROA Vol. III, pp. 1231-59).

Then, unsatisfied that removal of Kevin Luzak as an officer was sufficient, on August 3, 2012, Merrill Light called a special shareholder's meeting for the purpose of removing Kevin Luzak from the board of directors. (ROA Vol. I, pp. 177-181). Mr. Barringer did not attend that meeting. At that shareholder's meeting, Merrill Light, under the guise of a power of attorney from Decedent Paul Barringer,[19] and without disclosing that she was acting as co-trustee, used the combined 51% voting interest of her and Paul Barringer's voting stock to remove Kevin Luzak as a director and replace him with Merrill Light's husband, Randy Light. (*Id.*). Consistent with the secrecy surrounding Merrill Light's appointment as co-trustee, no one, including Ms.

[18] Kevin Luzak was prohibited by the corporate attorney from voting due to Mr. Luzak being the subject of the vote, while the remaining director, Mike Hagler, the sole independent director and respected attorney, voted against Kevin Luzak's removal and disputed the validity of the vote while questioning Mr. Barringer's capacity. (ROA Vol. IX, pp. 3814-3817).

[19] As Ms. Luzak understood it at the time. (ROA Vol. VIII, pp. 3530-3531, ¶ 39).

Light, ever informed Ms. Luzak during this meeting that Merrill Light was a co-trustee of the Paul B. Barringer Revocable Trust. The guise of voting her father's stock under a power of attorney was presented to the shareholders, when in truth the voting records of that meeting reflect that Ms. Light actually voted her father's stock as "co-trustee." The minutes of that meeting with that voting tally sheet were never sent to Ms. Luzak. (ROA Vol. I, pp. 242-43, ¶ 78(a); ROA Vol. II, p. 646). Mr. Jolley attended that meeting as a proxy for Merrill Light. Travis Bryant had been elected CEO of CFRC upon the removal of Kevin Luzak at the June 28, 2012 Board meeting, and he, therefore, presided over the August 3 shareholders' meeting. Mr. Bryant was scripted on how to conduct the meeting. He was given that script by longtime attorney for the Lights, John Jolley. He followed the script, and Kevin Luzak was removed as a director of CFRC. Ms. Light's husband, Randy Light, was made director in Mr. Luzak's place.

The subterfuge, so far, was:

- Ms. Light had become co-trustee of her father's trust. (2/28/12)
- Then her father ostensibly transferred his voting stock into that trust, giving Ms. Light effective control over his voting power. (May 11, 2012)
- He then changed that trust to leave all of his voting shares to Ms. Light after his and Ms. Barringer's death, effectively cutting Ms. Luzak out of her intended share of voting stock and effectively eventually vesting control of the family business in Ms. Light. (July 20, 2012)
- Then Kevin Luzak was removed as an officer at a director's meeting where Mr. Barringer was prompted on how to vote, (6/28/12) and
- Then Mr. Luzak was removed as a director at a shareholder's meeting where Ms. Light voted his shares purportedly under the guise of Mr. Barringer's power of

attorney when, in fact, she voted them using her power as co-trustee so that she would not reveal the scheme.(8/3/12)

But even that was not enough. Although Ms. Light had effective control of CFRC by combining her shares with the control over her father's shares as co-trustee, her fiduciary duties as co-trustee of her father's trust could limit her. Besides, it was theoretically possible that her father could change his mind and change the trust, highly unlikely given his dementia and capacity problems, but still theoretically possible.

Outright ownership was the best way to gain control of CFRC, unfettered by fiduciary obligations to her father's trust, and free of the off-chance that he might change his trust…especially when Ms. Luzak would inevitably discover what had happened.

That was accomplished in September, 2012. By two documents dated September 11, 2012, an Assignment of Shares and a Stock Power, Paul Barringer as a co-trustee of the Paul B. Barringer Revocable Trust purportedly assigned and transferred essentially all of his voting shares of non-party CFRC to Merrill Light as trustee of her own Merrill Barringer Light Revocable Trust. (ROA Vol. I, pp. 185-87). This transfer was carried out with the assistance of Randy Light and others. (ROA Vol. IX, pp. 3757, 3759-62). Since Merrill Light already owned 31.2% of the voting stock, Paul Barringer's purported transfer of this 20% block from the Paul Barringer Revocable Trust gave Ms. Light 51.2% of the voting shares of CFRC. Thus, she ostensibly became the controlling shareholder. (ROA Vol. I, p. 154). This transfer to the Merrill Light Revocable Trust occurred while Merrill Light was continuing to serve as co-trustee of the Paul Barringer Revocable Trust. (ROA Vol. III, pp. 1231-91).

Ms. Luzak was not informed of the purported stock transfer. (ROA Vol. I, pp. 245-46, ⁋ 84, 249-50, ⁋ 90 and 188-89; ROA Vol. VIII, p. 353, ⁋ 40). Mr. Jolley prepared and handled the execution of the stock transfer documents that gave Ms. Light control of CFRC.

On June 12, 2014, years after Paul Barringer's cognitive impairment rendered him susceptible to undue influence, Paul Barringer, assisted by the Lights' own estate planning attorney, purportedly changed his revocable trust again, this time to eliminate Ms. Luzak as a beneficiary and to leave the share, previously designated for her, to her minor son instead. (ROA Vol. III, pp. 1260-91). The same attorney for the Lights, who drafted the prior two sets of estate planning agreements in 2012, drafted this third trust restatement. (*Id*.) On each occasion, medical records establish that Paul Barringer was incompetent due to Alzheimer's disease. (ROA Vol. VIII, p. 3536, ⁋ 58; ROA Vol. VIII, p. 3512, ⁋ 67).

According to Ms. Luzak, Ms. Barringer had kept Ms. Luzak from seeing and communicating with her father. During this time period from July 2012 to June of 2014, Ms. Luzak set up visits between her family and her parents only to have all of them cancelled by her mother. Also, Ms. Barringer instructed Ms. Luzak to always call her on Ms. Barringer's mobile phone and not to call the land-line number at the home where Paul Barringer lived and had access to the phone. (ROA Vol. VIII, pp. 3531, ⁋ 41 and 3536, ⁋ 59). When Ms. Luzak had trouble connecting with her mother's mobile number, Ms. Luzak inquired with her parents' personal assistant to make sure her contact information with her mother was correct and up-to-date. (ROA Vol. IX, pp. 3764-65).

And still no one had ever told or disclosed to Ms. Luzak what had happened with her father's trust and with his voting shares. It was not until December 2014 when CFRC issued its annual financial statement for the fiscal year ending September 30, 2014 that Ms. Luzak

discovered a note in the 2014 financial statement about a stock issuance to an undisclosed officer. (ROA Vol. II, p. 653). Because Ms. Luzak did not believe her father, Paul Barringer, would ever agree to that, Ms. Luzak's attorney, pursuant to Ms. Luzak's statutory shareholder inspection rights,[20] made three written requests to CFRC asking for, among other items, a copy of the stock transfer books of the corporation showing the stock ownership of the company since June 2012. (*Id.*) After the third request CFRC finally submitted on March 13, 2015 its stock register showing the transfer of Paul Barringer's voting stock to Merrill Light's trust. (*Id.*)

During this same time period, Paul Barringer on February 5, 2015, ostensibly changed his revocable trust and will for a final time, again with the assistance of the Lights' long-time attorney. This amendment eliminated the share for Ms. Luzak's minor son, thereby eliminating both Ms. Luzak and her son as beneficiaries. (ROA Vol. III, pp. 1339-69). In 2014 and 2015, Paul Barringer's mini-mental exam scores demonstrated his chronic lack of capacity.[21] On each of the occasions in 2012, 2014, and 2015 that Mr. Barringer changed his will and trust together, Ms. Barringer, represented by the same attorney, similarly changed her estate planning documents.

After Randy Light became chairman of the board of directors in February 2015, CFRC, under the full control of defendant Merrill Light, commenced federal litigation in Virginia seeking, *inter alia*, declaratory relief regarding Merrill Light's proportional interest in CFRC. (*Luzak v. Light, et al*, 1:15-cv-501 (E.D.Va. 2015) (Dkt # 1); ROA Vol. I, p. 256, ¶104(b)). Ms. Luzak filed two counterclaims for (1) a breach of contract against defendant Merrill Light and CFRC based on a 2010 Shareholders Agreement among Ms. Luzak, her siblings and CFRC,

[20] See Va. Code Ann. §§ 13.1-771 and -772 applicable to CFRC as a Virginia- incorporated entity.

[21] For a thorough and detailed list of medical reports of his issues with dementia, see (ROA Vol. II, pp. 845-49 and Vol. V, pp. 2100-60).

regarding transfers of CFRC stock for consideration (the "contract claim")[22]; and (2) a separate and unrelated counterclaim asserting shareholder derivative claims against CFRC, Travis Bryant, and defendants Merrill and Randy Light involving the 2013 stock sale and option grant to Mr. Bryant. (*Id*. at ROA Vol. I, pp. 256-57, ⁋ 104(c)). The federal district court ultimately dismissed both of the narrowly drawn claims including the contract claim, finding that the stock transfer to Merrill Light was a gift, not a sale for valuable consideration, which did not trigger the 2010 Barringer Shareholders Agreement. The dismissals were upheld by the 4th Circuit Court of Appeals.

Ms. Luzak discovered information in the Virginia litigation showing that her father's mental capacity was severely compromised. Soon thereafter in early 2016, she brought a conservatorship action seeking to protect her father. Ms. Barringer and Merrill Light resisted the conservatorship action and acquiesced only when Mr. Barringer scored a one on a mini-mental test on April 22, 2016, although he died soon thereafter before the conservatorship could be completed. As early as October 2015, Ms. Barringer participated in sending Mr. Barringer to an adult day care center, where he was seen unshaven and in an unkempt condition, completely opposite to how he appeared when competent.

On May 30, 2016, Paul Barringer died from Alzheimer's disease. (ROA Vol. I, p. 263, ⁋ 117 ; ROA Vol. I, p. 317, ⁋ 117).

Mr. and Ms. Barringer executed reciprocal estate planning documents in December 1998. The documents purport to give each other a special testamentary power of appointment over

[22] After CFRC moved to drop its declaratory petition, the Eastern District of Virginia federal court re-aligned the parties on August 14, 2015 making Ms. Luzak the named plaintiff and Merrill Light and CFRC the defendants. *Luzak v. Light, et al*, 1:15-cv-501 (E.D.Va. 2015) (Dkt # 89). On August 28, 2015, despite serious questions about his mental capacity, Paul Barringer ostensibly intervened as a defendant in the Contract Claim. (*Id*. at Dkt. # 94). His intervention occurred during a several-month period when he was scoring zero, four, and ten on the 30-point mini-mental exam.

assets poured over into revocable trusts. Both expressly declined in those documents to exercise any power of appointment they might have. In 2012, 2014, and 2015, Mr. Barringer purportedly executed new estate planning documents. On each occasion, Ms. Barringer executed similar documents. On each occasion, the documents contained language purporting to give each other special testamentary powers of appointment. Neither Mr. nor Ms. Barringer executed any power of appointment while Mr. Barringer was alive. After Mr. Barringer's death, Ms. Barringer began executing estate planning documents attempting to exercise her purported power of appointment, appointing controlling voting stock in the company. (ROA Vol. IV, pp. 1540-50, 1636-46, 1647-57 and 1746-55). This was the same stock purportedly gifted by Mr. Barringer's revocable trust to Merrill Light's revocable trust on September 11, 2012. On numerous occasions before his death, Mr. Barringer took actions demonstrating his intent for voting control of the company to be equally divided between Ms. Luzak and Ms. Light. Ms. Barringer participated in and/or acquiesced in such actions. (ROA Vol. V, pp. 2083-86, ⁋⁋ 51-56; ROA Vol. V, pp. 2062-66, ⁋⁋ 57-59, 65). Ms. Barringer has demonstrated great animus towards Ms. Luzak and Kevin Luzak. (ROA Vol. VIII, p. 3533, ⁋⁋ 47-50; ROA Vol. VIII, p. 3509, ⁋⁋ 53-56).

STANDARD OF REVIEW

The standard for a summary judgment follows the scintilla of evidence rule, with the evidence and all reasonable inferences viewed in light of the non-moving party.

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted). Summary judgment is appropriate only when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id*.; Rule 56(c), SCRCP.

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860 (citation omitted). "In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011); *Hancock v. Mid–South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

> Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C.1975); see also *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) ("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. 10AWright & Miller, Federal Practice and Procedure § 2741, p. 543 (1983); 6 Moore's Federal Practice ¶ 56.02, p. 56-39 (2d ed. 1990); see, e.g., *First Chicago Int'l v. United Exchange Co.*, 836 F.2d 1375 (D.C.Cir.1988); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230 (2d Cir.1985); *Tyler v. City of Enterprise*, 521 So.2d 951 (Ala.1988); *Gangadean v. Leumi Fin. Corp.*, 13 Ariz.App. 534, 478 P.2d 532 (1970); *Commercial Bank of Kendall v. Heiman*, 322 So.2d 564 (Fla.Dist.CtApp.1975); *Board of Education v. Van Buren & Firestone, Architects, Inc.*, 165 W.Va. 140, 267 S.E.2d 440 (1980); *cf.* Rule 56(f), SCRCP.

Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543-44 (1990).

> "Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law." *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct.App.1989). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Hall*, 349 S.C. at 173–74, 561 S.E.2d at 656; *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct.App.2001); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct.App.2000); see also *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003) (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom).

Schmidt v. Courtney, 357 S.C. 310, 320, 592 S.E.2d 326, 331 (Ct. App. 2003).

ARGUMENT

In Ms. Luzak's second cause of action, for constructive trust and injunction, she alleges Ms. Barringer made an express or implied promise not to exercise any testamentary power of appointment she may have in a manner that would redirect the subject property other than as set forth in the default provisions of the estate plan of Mr. Barringer. In particular, Ms. Barringer has contended that she has a testamentary power of appointment to redirect the voting stock of Mr. Barringer in his legacy company CFRC to Merrill Light. Ms. Luzak alleges that, if in fact Mr. Barringer intended to give Ms. Barringer a testamentary power of appointment over such voting stock, which she disputes, Mr. Barringer relied on Ms. Barringer's express or implied promise not to exercise the testamentary power of appointment given her. Based on numerous estate planning and succession documents of Mr. Barringer,[23] Mr. Barringer intended to treat his daughters – Ms. Luzak and Ms. Light – equally, especially with respect to control of his legacy company. Based on the estate planning documents produced by Ms. Barringer and assertions made in court, she intends to disregard her promise and/or the trust reposed in her by executing or intending to execute a will that would exercise any testamentary power of appointment given to her in a manner inconsistent with her and Paul Barringer's 1998 wills and trusts. (ROA Vol. IV, pp. 1540-50, 1636-46, 1647-57 and 1746-55; ROA Vol. XVII, p. 7592, line 18-p. 7593, line 2). Consequently, Ms. Luzak sought an order from the court directing Ms. Barringer to comply with her promise and the trust reposed in her not to exercise any testamentary power of appointment given her and to impose a constructive trust for the benefit of Ms. Luzak in the subject property with respect to the intended equal treatment of Ms. Luzak.

[23] Those that were not invalid because of, inter alia, undue influence, mistake, fraud, tortious interference with inheritance, civil conspiracy, and/or lack of capacity. Ms. Luzak alleges that any of Mr. Barringer's estate planning documents purportedly executed after 2011 are invalid for one or more of those reasons.

In Ms. Luzak's third cause of action, for enforcement of contract not to revoke and injunction, she alleges that Mr. Barringer and Ms. Barringer entered into a binding contract not to revoke their estate plans, especially with respect to Ms. Barringer's Will(s) that did not exercise any power of appointment related to voting stock before Mr. Barringer's death. This contract not to revoke applied to the 1998 estate plans in place that were not the result of, inter alia, undue influence, mistake, fraud, tortious interference with inheritance, civil conspiracy, fraud, and/or lack of capacity because any estate plan of Mr. Barringer resulting from those actions would be invalid. Consequently, Ms. Luzak sought an order from the court directing Ms. Barringer to comply with the contract not to revoke.

In brief, Ms. Luzak makes a number of assertions, any one of which successfully supports her second and third causes of action.

1. Paul Barringer never intended to give Ms. Barringer a power of appointment over controlling voting stock. [See Issue 1 below]
    a. Despite Ms. Barringer's assertions, there is no reliable evidence that any advisor explained the effect of the power of appointment language in the documents or discussed powers of appointment with Paul Barringer.
    b. Paul Barringer never involved his wife in the company business, gave her any stock, or named her trustee. (ROA Vol. V, pp. 2063-66, ⁋⁋ 58-65; ROA Vol. XI, pp. 4622-25; ROA Vol. V, pp. 2084-86, ⁋⁋ 52-56; ROA Vol. XI, pp. 4617-20). Why would he give her the power to change his intentions about who would run his legacy company after his death?
    c. The power of appointment language in the documents purportedly gives Ms. Barringer the power to appoint to descendants. Why would Paul Barringer give

her power to give control over his legacy company to a grandchild, great-grandchild, etc.: someone who might not have even been born by the time of his death?

d. Paul Barringer's intent is determined according to the facts and circumstances existing at the time of execution of the documents. On December 4, 1998, the date that Mr. Barringer executed the operative testamentary documents, he could not have intended to give Ms. Barringer the power over stock with voting control because he did not own enough stock on that date to affect voting control.

2. Even if Paul Barringer intended to give Ms. Barringer a testamentary power of appointment, she does not have the power to exercise it for several reasons, any one of which successfully supports Ms. Luzak's second and third causes of action.

   a. There was an express promise not to exercise by Ms. Barringer who was in a fiduciary and/or confidential relationship with Paul Barringer. [See Issue 2 below]

   b. There was an implied promise not to exercise by Ms. Barringer who was in a fiduciary relationship with Paul Barringer. [See Issue 2 below]

   c. Ms. Barringer is equitably estopped from exercising any such power of appointment. [See Issue 3 below]

   d. A contract not to exercise any power over the voting stock existed, pursuant to South Carolina statutes. [See Issue 4 below]

These issues are explained more fully in the Argument sections that follow.

I. THE TRIAL COURT ERRED IN RULING BY SUMMARY JUDGMENT THAT DECEDENT PAUL B. BARRINGER GAVE MERRILL BARRINGER A SPECIAL TESTAMENTARY POWER OF APPOINTMENT OVER CONTROLLING VOTING STOCK IN HIS LEGACY COMPANY.

The trial court's order failed to even consider the evidence showing that Paul Barringer never intended to give Ms. Barringer a power to appoint voting stock. Because the order focuses on a discussion of the 1998 documents,[24] Ms. Luzak will do so as well for purposes of this appeal.[25] This is consistent with Ms. Luzak's contention that any will or trust documents purportedly executed by Mr. Barringer after 1998 are invalid for undue influence, mistake, fraud, tortious interference with inheritance, lack of capacity, etc. in the consolidated actions, leaving the 1998 instruments as the operative documents.[26]

Paul Barringer never allowed Ms. Barringer to have anything to do with the company, either CFRC or its predecessor. She is not and was not ever an officer, not a director, not an employee, and not a stockholder. Until his dementia subjected him to Defendants' improper influence, she had no say and no involvement in the company whatsoever. Paul Barringer never made Ms. Barringer a trustee of any of his trusts, although he variously named his three children

[24] The order refers to Ms. Luzak's response to interrogatories indicating that any promise would have been made no later than 1998. Ms. Luzak's position is based on the contract and separate non-contractual promise that arose at the time of the 1998 document executions, as discussed below. But Ms. Luzak's responses to interrogatories clearly do not limit the evidence to the time of execution of the 1998 documents; subsequent evidence is valid as well, as also discussed below.

[25] Nevertheless, Ms. Luzak's argument prevails as to any subsequent valid document. The order failed to address the issue of the summary judgment by Judge Price, dated July 6, 2021, granting Ms. Light's motion for summary judgment as to the February 28, 2012 Will and Trust, finding that those documents were valid. Although that order is under appeal, if it is upheld, that means the 1998 Will and Trust documents are revoked and thus cannot grant a power of appointment to Ms. Barringer. As discussed below, even if the February 28, 2012 Will and Trust are the operative documents, Ms. Luzak's contention that Paul Barringer did not intend to give Ms. Barringer a power to appoint voting stock still prevails. And if the February 28, 2012 documents are valid, as determined by Judge Price's order, then any subsequent documents are invalid: if a subsequent document were valid, then the February 28, 2012 documents are not valid because they are revoked; the only way the February 28, 2012 documents can be valid is that the subsequent documents were never valid. See *White v. Wilbanks*, 301 S.C. 560, 393 S.E.2d 182 (1990).

[26] For a thorough discussion of the voluminous medical and non-medical evidence proving Ms. Luzak's contention about the invalidity of any post-1998 Will and Trust (ROA Vol. II, pp. 844-49 and Vol. V, pp. 2101-60).

as trustees or substitute trustees. There is no evidence whatsoever that Paul Barringer intended his wife, with no knowledge of, involvement in, or power ever with the company, to decide after he died who might control the company. The facts regarding his treatment of Ms. Barringer as to the company supports the opposite conclusion —*i.e.*, Paul Barringer never intended to give Ms. Barringer a power to effect the distribution of voting stock. This is all evidence, in this record, that creates a genuine issue of material fact precluding summary judgment.

The deposition of Neill McBryde was devastating to Ms. Barringer in that it exponentially increased the genuine issues of material fact as to the 1998 documents — the only documents McBryde was involved with. McBryde could recall very little, if any, specifics about his estate planning with Paul Barringer and Merrill Barringer. Despite contrary affirmations in sworn affidavits, when deposed, he admitted that he had no specific recollection of discussing a power of appointment with the Barringers. He met only with Paul Barringer until the execution of the documents. Mrs. Barringer was never present, nor was any communication directed to her until McBryde mailed drafts (according to an unsigned copy of a letter in his file) for review two days before the Barringers apparently traveled from Hilton Head to Charlotte to execute the documents, ostensibly having had to drink from a firehose of complex documents between the time the drafts arrived and their travel to Charlotte without benefit of legal consultation, assuming they ever received the drafts in time.[27]

McBryde testified that he never discussed voting control or stock with Paul Barringer, meaning that he never explained to Paul Barringer that any voting stock would be subject to any power of appointment. The grant of a power of appointment, as with any grant, requires intent.

[27] (ROA Vol. XI, pp. 4919-22, 4928-38, 4940-42, 4945, 4952-57, 4960-67, 4988, 4992, 4995, 4999-5000, 5011, 5014-16, 5021-23, 5025-28, 5036-37, 5043-46, 5050, 5052 and 5063). The McBryde deposition was attached as Exhibit 8 to Ms. Luzak's memorandum opposing Merrill Barringer's second summary judgment motion, with excerpts from his files of Paul Barringer at Exhibit 3.

Paul Barringer could not have had any such intent, given that McBryde never discussed voting stock with him. McBryde's voluminous notes showed only one reference of a few words that even mentioned a power of appointment, and it could have referred to any number of powers of appointment found in the McBryde documents, most likely those given to the Barringer children, and not to Ms. Barringer.[28] McBryde admitted that his notes did not necessarily mean that he discussed that issue with a client, but were often simply reminders to him to do something.[29]

Importantly, *McBryde testified that he did not tell Paul Barringer or Ms. Barringer that the powers of appointment could affect control of the company*.[30]

Also importantly, Paul Barringer could not have intended to give Ms. Barringer a power of appointment over controlling voting stock in the 1998 documents because he did not have enough stock at that time to affect control. He had already given voting stock control to his children, who could act without him, and he did not keep enough stock to team with one child for control.[31] It was not until the corporate reorganization in 2004 that Mr. Barringer regained enough stock to align with either daughter to effect control of CFRC. A testator and/or settlor's intent must be construed in accordance with the facts and circumstances that exist at the time the relevant documents are executed,[32] so Paul Barringer could not have intended to give such a

[28] McBryde admitted that the 1998 documents he created gave the children testamentary powers of appointment as well. His one shorthand note referring to powers of appointment indicated that property would be in trust as long as possible, which anticipates that the children would have testamentary powers of appointment. This again indicates that Paul Barringer did not intend to give Merrill Barringer any power of appointment over any voting stock. (ROA Vol. XI, pp. 4975-76).

[29] Similar facts apply to Jolley and the February 28, 2012 documents. *Nowhere* in Jolley's notes or communications did he discuss or demonstrate a power of appointment. *Nowhere* in his notes or communications did he discuss voting stock or control. Even though he testified at one point in his deposition that he explained the power of appointment, when pressed he could not specifically recall what he said or how he said it. (ROA Vol. XV, pp. 6455, line 20-p. 6456, line 20).

[30] (ROA Vol. XI, pp. 5063).

[31] See voting agreement, Exhibit A, Attchm't 7, to the first summary judgment motion, incorporated by reference into Ms. Luzak's response to the second summary judgment motion. (ROA Vol. III, pp. 1140-48).

[32] See, *e.g.*, *Estate of Fabian*, 362 S.C. 349, 483 S.E.2d 474 (Ct.App. 1997).

power of appointment in 1998 because he knew he did not himself have enough stock to affect control.

The language of the powers of appointment in all the documents[33] states that Ms. Barringer can appoint to any child or descendant. Paul Barringer would not have given someone the power to appoint controlling stock to any descendant, which could be a grandchild, great-grandchild, etc., that he may have never known before he died. He always maintained equal control among his children and intended that it continue.[34] Again, there is simply no evidence that Paul Barringer understood and intended for Ms. Barringer to change his long-held plans for equal control of the company.

Another reason Paul Barringer did not understand and intend that his voting stock would be controlled by someone else is because his trustee in all of his trusts had the power to distribute principal — to Ms. Barringer and the children — and/or to sell the trust property. Again, he never named Ms. Barringer as trustee, and the trustees and successors of his 1998 Trust were his son, a friend, and a bank, all of whom possessed the business acumen and knowledge that Ms. Barringer lacks. Paul Barringer would never have allowed a trustee to distribute or sell voting stock, yet the language of the trust documents appear to do exactly that, clearly demonstrating a genuine issue of material fact as to whether he had any intention for his voting stock to be controlled as part of any power of appointment or trustee power.

Ms. Barringer argued that there is no evidence that Paul Barringer wanted to maintain equal control of the company regardless of how a child might have behaved subsequently, but that argument is without merit and contradicted by the facts: *Paul Barringer had already given*

[33] Again, because of the grant of summary judgment, Ms. Luzak was deprived of the opportunity to show a jury the voluminous evidence as to why all of the post-1998 documents are invalid.

[34] When his son Victor took a spin-off company, Paul Barringer allocated the remaining stock to treat his two daughters equally as to CFRC, confirming his long-stated intentions.

away control of his company to his children by 1998; regardless of their subsequent behavior, they still had control that he had no power to take back.[35] His very actions prove that he did not care about future behavior because he had already irrevocably given away control.

II. THE TRIAL COURT ERRED IN RULING BY SUMMARY JUDGMENT THAT DEFENDANT MERRILL BARRINGER WAS NOT PRECLUDED FROM EXERCISING ANY SPECIAL TESTAMENTARY POWER OF APPOINTMENT OVER CONTROLLING VOTING STOCK IN THE LEGACY COMPANY BECAUSE OF A PROMISE RELATED TO A FIDUCIARY AND/OR CONFIDENTIAL RELATIONSHIP.

Even if the language of the documents successfully gave Ms. Barringer a power of appointment over voting stock, she promised not to exercise it. There are several ways that such a promise can be enforceable. One is a contract not to revoke or not to exercise; another is by an *express* unilateral promise based upon a confidential or fiduciary relationship; and another is by an *implied* unilateral promise based upon a confidential or fiduciary relationship. The contract not to exercise requires the elements of a contract and must satisfy the requirements of S.C. Code section 62-2-701. The express or implied unilateral promise does not require the elements of a contract and is not governed by S.C. Code section 62-2-701.

The trial judge erred in failing to adequately distinguish these differences and focused instead on the requirements of S.C. Code section 62-2-701. Ms. Luzak recognizes that South Carolina Code section 62-2-701 provides the sole means for proving a contract, as discussed below, but section 62-2-701 expressly addresses contracts…not unilateral promises. Unilateral promises, express or implied, are governed by the common law that found expression in *Chapman v. Citizens and Southern Nat. Bank of South Carolina*, 302 S.C. 469, 395 S.E.2d 446 (Ct. App. 1990). Section 62-2-701 is the sole source of law governing contracts not to revoke,

[35] So, for example, if one of the children robbed a bank after 1998, there was nothing Paul Barringer could do as to the voting stock because he had already given it away.

superseding any prior common law as to contracts not to revoke, but it does not and cannot supersede the common law dealing with enforceable promises that *are not contracts.* See S.C. Code §62-1-103 (probate common law survives unless supplanted by statute). The *Chapman* case therefore remains valid law and is unaffected by the statute. [36]

To focus exclusively on a contract diverts attention away from the common law and *Chapman*.

Thus, the common law, and not Section 62-2-701, applies to the enforceable promise cause of action — Ms. Luzak's second cause of action.

Ms. Luzak recognizes that the facts in *Chapman* differ from the facts in this case, but the statement of law in *Chapman* is nevertheless valid, controlling, and apropos: a spouse is bound by a promise not to exercise, if that promise is made while the spouse is in a fiduciary or confidential relationship; a contract is not necessary. That principle of law applies to any fact pattern in which a unilateral promise is made in a fiduciary or confidential capacity, and it is not necessary that the exact fact pattern match *Chapman*. The holding in *Chapman* is logical: a unilateral promise made in a fiduciary or confidential relationship is sufficient to make the promise enforceable and not have to be supported by mutual consideration. It is the substance of that relationship that supports the promise, not a mutually bargained-for exchange, and it not logical that for any statute like S.C. Code section 62-2-701 to require a decedent to set forth the terms of a unilateral promise when the decedent was not the promisor.

Importantly, the *Chapman* court, citing the leading national authority on trust law, stated that the promise did not even have to be express. *Id.* at 479, 395 S.E.2d at 452. Rather, the promise could be implied, even by silence. The *Chapman* court specifically and expressly

[36] Moreover, *Chapman* was decided in 1990, while section 62-2-701 became effective in 1987.

adopted the rule in Bogert, Trusts, §89 (6th ed. 1987), noting that the promise by the fiduciary or the one in a confidential relationship may be express or implied, even by silence. *Id*. The trial court's order granting summary judgment to Ms. Barringer is in direct contravention to the rule announced by this Court of Appeals in *Chapman*. Ms. Luzak clearly has demonstrated sufficient evidence to show that Ms. Barringer made such a fiduciary or confidential promise, even if only by silence or acquiescence. Even Ms. Barringer's silence on this issue in this litigation has been deafening. She has yet to provide testimony or even a mere affidavit denying the allegations and evidence of Ms. Luzak on this issue.[37] The record in this matter shows that the Barringers and their children held regular family estate planning meetings from at least 1992 through 2011, and at each one of those meetings, Mr. Barringer made his intent clear to treat his children equally, and then after son Victor had received his inheritance in advance, to treat the two daughters equally. That is why Mr. Barringer would comment that his daughters would share equal control of CFRC and would have to "work together," and never once did Ms. Barringer speak up or state any contrary intention. (ROA Vol. V, pp. 2083-86, ¶¶ 51-56 ; ROA Vol. V, pp. 2062-66, ¶¶ 57-65). Her silence confirmed the plan.

In Ms. Luzak's second cause of action, for constructive trust and injunction, Ms. Luzak alleges that Ms. Barringer made an express or implied promise not to exercise any testamentary power of appointment she may have in a manner that would redirect the subject property in a manner other than as set forth in the default provisions of the estate plan of Paul Barringer. If, in

[37] *See Davis v. Sparks*, 235 S.C. 326, 333, 111 S.E.2d 545, 549 (1959) ("'In the absence of explanation, the failure or refusal of a party to produce evidence may create an adverse inference where such evidence is within his knowledge, and within his power to produce, is not equally accessible to his opponent, and is such as he would naturally produce if it were favorable to him.'") (quoting 31 C.J.S. Evidence § 156a, p. 847); see also *Matthews v. Porter*, 239 S.C. 620, 633, 124 S.E.2d 321, 328 (1962) ("It is well settled in this State that if a party fails to produce the testimony of an available witness on a material issue in the cause, it may be inferred that such testimony, if presented, would be adverse to the party who fails to call the witness.")

fact, Paul Barringer intended to give Ms. Barringer a testamentary power of appointment over such voting stock, which Ms. Luzak disputes, Paul Barringer relied on Ms. Barringer's express or implied promise not to exercise the testamentary power of appointment given her. Based on numerous estate planning and succession documents of Paul Barringer,[38] Paul Barringer intended to treat his daughters — Ms. Luzak and Defendant Merrill Light — equally, especially with respect to control of his legacy company. Based on the estate planning documents produced by Ms. Barringer and assertions made by her counsel in court, she intends to disregard her promise and/or the trust reposed in her by executing or intending to execute a will that would exercise any testamentary power of appointment given to her in a manner inconsistent with her and Paul Barringer's 1998 wills and trusts.

Until dementia and the defendants took hold of Mr. Barringer's mind no later than early 2012, all of the known estate planning instruments (dating at least from 1998) and all of the dispositive intentions of Mr. and Ms. Barringer pointed to a continuing agreement between them to treat the children equally and not to unilaterally change their joint estate planning, confirmed by Ms. Barringer's silence.

Ms. Barringer's 1998 Will made an express promise to her now deceased husband by stating that she would not exercise her power of appointment. The Barringers' 1998 estate planning documents dovetailed each other. Each Will expressly decline to exercise any powers of appointment.[39] Accordingly, Ms. Barringer never attempted to exercise the power of

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[38] Those documents that were not invalid because of, inter alia, undue influence, mistake, fraud, tortious interference with inheritance, civil conspiracy, and/or lack of capacity. Ms. Luzak alleges that any of Mr. Barringer's estate planning documents purportedly executed after 2011 are invalid for one or more of those reasons.

[39] See M. Barringer Last Will & Testament of Dec. 4, 1998, Item III, where Merrill Barringer expressly declines to appoint to her own revocable trust any property from any other person's estate over which she may have had a power of appointment, stating: "All of the rest, residue, and remainder of my property… (*but <u>not</u> including any property over which I may have a power of appointment*), I devise to the then acting Trustee of The Merrill U.

appointment over his trust for the rest of Paul Barringer's life. It was not until dementia had taken over Mr. Barringer's mind and then later when death had come to Mr. Barringer that Ms. Barringer abandoned her promise and undertook to exercise her purported power of appointment inconsistent with her 1998 Will. Fact finders may draw a reasonable inference from the facts, and such inferences may create an issue of material fact. Summary judgment is not appropriate if the fact-finder could infer from the facts that Paul Barringer understood and believed that his wife would ensure that the daughters were treated equally as he had done over the decades before dementia seized his mind. Stated differently, a fact finder can reasonably conclude from the evidence that Mr. and Ms. Barringer always intended to treat the children equally and that neither would change their estate plans that would result in unequal treatment of the children. The evidence from which such a conclusion could be drawn are the decades of estate planning where the children were treated equally and the Barringers dovetailing their Wills and Trusts to mirror each other in order to protect that intent. The evidence to which the defendants Will point to oppose that inference is evidence occurring after the onset of dementia. For summary judgment to be sustained on this issue would require the Court to engage in weighing the evidence as opposed to merely checking to see if there are issues of fact in dispute and if those issues are material. Paul Barringer's failure to exercise any power for the rest of his competent life, and even for the rest of his life once Paul Barringer was incompetent; and from the numerous other situations where Ms. Barringer engaged in acts supporting Paul Barringer's intent that the children be treated equally, and always acquiesced and never expressed any disagreement about his intention of equal treatment.[40]

Barringer Revocable Trust…" (emphasis added). (ROA Vol. II, pp. 975-76). The Last Will and Testament of Paul Barringer executed at the same time contains reciprocal language in Item III. (ROA Vol. II, pp. 913-14, Item III).

[40] For example, the estate planning related documents discussed at footnote 4, *supra*.

Yet, *according to the trial court, none of this evidence creates even a scintilla of evidence* to support the existence of a non-contractual promise based on a fiduciary and/or confidential relationship, even though Ms. Barringer's silence in itself speaks loudly.

Ms. Barringer argued that it would make no sense for Paul Barringer to give Ms. Barringer a power of appointment and then rely on her promise not to use it, but that is exactly what happened in *Chapman* and exactly what section 62-2-701 regarding contracts not to exercise, discussed more fully below, governs.

III. THE TRIAL COURT ERRED IN RULING BY SUMMARY JUDGMENT THAT DEFENDANT MERRILL BARRINGER WAS NOT PRECLUDED FROM EXERCISING ANY SPECIAL TESTAMENTARY POWER OF APPOINTMENT OVER CONTROLLING VOTING STOCK IN THE LEGACY COMPANY BECAUSE OF PROMISSORY AND/OR EQUITABLE ESTOPPEL.

Ms. Luzak's second cause of action is also supported by the doctrine of equitable estoppel, which enforces a promise that is not contractual.[41] This is akin to the foregoing argument on unilateral promises made in a confidential or fiduciary relationship. Just as section 62-2-701, dealing exclusively with contracts, consequently does not and cannot supersede common law enforcement of non-contractual promises based on fiduciary or confidential relationships, section 62-2-701 likewise cannot supersede the common law of equitable estoppel, which by definition is non-contractual. In South Carolina, equitable estoppel can apply based on silence.[42] As with the fiduciary/confidential promise issue, the trial judge failed to distinguish

[41] Judge Bonds' order states that Ms. Luzak has not asserted a claim for promissory estoppel. That is incorrect. Ms. Luzak's complaint alleges that, separate and apart from any promise pursuant to a contract, Ms. Barringer promised not to exercise any power of appointment. (See Ms. Luzak's second cause of action including but not limited to ¶ 137 thereof) (ROA Vol. I, pp. 414-15, ¶¶ 134-40). Promissory estoppel involves a promise, as does the fiduciary/confidential relationship argument involve a promise, neither of which need be part of a contract.

[42] See, e.g., *Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012); *State v. Hinojos*, 393 S.C. 517, 713 S.E.2d 351 (Ct. App. 2011); *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006); *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001); *Maher v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (Ct. App.

the difference between equitable estoppel, which does not require a contract, and a contract not to revoke, which is governed by section 62-2-701.

The trial court misconstrues *Satcher*,[43] a classic equitable estoppel case in which the party relying on a non-contractual promise was entitled to enforce it. *Satcher* allowed purely oral, or non-written proof, to establish estoppel and hence the enforcement of the promise, proving that section 62-2-701, which requires some written proof of a contract not to revoke, does not apply to estoppel.[44] In this case, Paul Barringer relied on the promise of Ms. Barringer, and the doctrine of equitable estoppel clearly applies. There is evidence he relied on his wife's promise, whether express or implied, by declining to exercise the power of appointment she gave him and by his knowledge that she had promised to honor his intent to treat their children equally by declining to exercise any power in her 1998 Will or in any Will she executed thereafter while he was alive, by participating in family and estate planning meetings and never indicating that she would contradict his intention of equal treatment, and by participating in or acquiescing in other acts evidencing the intent to treat the children equally. That constitutes classic promissory estoppel.

Yet, *according to Judge Bonds, not a scintilla of evidence exists* to support the existence of a non-contractual promise based on equitable estoppel, even though silence in itself would suffice.

IV. THE TRIAL COURT ERRED IN RULING BY SUMMARY JUDGMENT THAT THERE WAS INSUFFICIENT EVIDENCE THAT DEFENDANT MERRILL BARRINGER WAS PRECLUDED FROM EXERCISING ANY SPECIAL TESTAMENTARY POWER OF APPOINTMENT OVER CONTROLLING VOTING STOCK IN THE LEGACY COMPANY DUE TO A

1998).

[43] *Satcher v. Satcher*, 351 S.C. 477, 570 S.E. 2d 535 (Ct. App. 2002).

[44] *Satcher* was decided some 15 years after the effective date of section 62-2-701.

CONTRACT NOT TO REVOKE HER 1998 WILL WHICH DID NOT EXERCISE ANY SUCH POWER — *I.E.*, DUE TO A CONTRACT NOT TO EXERCISE ANY SPECIAL TESTAMENTARY POWER OF APPOINTMENT OVER VOTING STOCK.

Separate and apart from the fiduciary/confidential relationship and equitable estoppel arguments, either of which is supported by sufficient facts for Ms. Luzak to avoid summary judgment, is Ms. Luzak's argument that a contract not to exercise existed, which in itself is supported by sufficient facts for Ms. Luzak to avoid summary judgment. With respect to contracts not to revoke, Ms. Luzak recognizes that section 62-2-701 governs. Nevertheless, Ms. Luzak satisfied the requirements of section 62-2-701, and certainly sufficient evidence suffices to avoid summary judgment.

The trial court's misunderstanding about section 62-2-701 is further demonstrated by its failure to determine whether the "decedent" in the statute is Paul Barringer or Ms. Barringer. The Will that is subject to the contract is Ms. Barringer's, and it is her Will against which the contract is enforced. Paul Barringer died first, and it is not his Will that breaches the contract. Ms. Barringer's Will would breach the contract, which is why Ms. Luzak sought an injunction against her breaching that contract.[45]

In Ms. Luzak's third cause of action, for enforcement of contract not to revoke and injunction, Ms. Luzak alleges that Paul Barringer and Ms. Barringer entered into a binding contract not to revoke their estate plans, especially with respect to Ms. Barringer's Will(s) that did not exercise any power of appointment, which included the power of appointment over the voting stock before Paul Barringer's death. This contract not to revoke applied to the estate plans in place that were not the result of, *inter alia*, undue influence, mistake, fraud, tortious

[45] South Carolina allows the enforcement of a contract concerning succession — section 62-2-701 — before the decedent dies. See *Wright v. Trask*, 329 S.C. 170, 495 S.E.2d 222 (Ct. App. 1997).

interference with inheritance, civil conspiracy, fraud, and/or lack of capacity because any estate plan of Paul Barringer resulting from those actions would be invalid.

In 1998, Paul Barringer executed, *inter alia*, a Will and Revocable Trust that included language purportedly giving Ms. Barringer a special testamentary power of appointment over property held in the revocable trust at his death, assuming she survived him.[46] Even if Ms. Barringer and Paul Barringer understood about the existence and possible application of a testamentary power of appointment given to Ms. Barringer in 1998, Ms. Barringer's 1998 Will, prepared by the same drafting attorney, and executed at the same time and in conjunction with Paul Barringer's 1998 Will and Revocable Trust, declined to exercise that testamentary power of appointment when she declined *any* power of appointment, including the one given to her mere minutes earlier by Mr. Barringer in his trust.

Moreover, Ms. Barringer's 1998 revocable trust apparently gave Paul Barringer an identical special testamentary power of appointment over the property in her Revocable Trust if he survived her — establishing the mutuality of their planning — which he similarly expressly and specifically declined to exercise in his Will. Thus, continuing to assume *arguendo* that Paul Barringer and Ms. Barringer understood what a testamentary power of appointment was and that Paul Barringer's 1998 documents contained such a special testamentary power of appointment, their symbiotic estate planning documents prepared by the same attorney and executed simultaneously included both a grant of such a testamentary power of appointment by Paul Barringer and a concomitant express declination to exercise that testamentary power of appointment by Ms. Barringer, and vice-versa.

[46] As discussed above, Ms. Luzak asserts that, based on family planning meetings and other planning conferences among Paul Barringer, Ms. Barringer, Ms. Luzak, and Ms. Luzak's husband Kevin Luzak, and others, there is no evidence that either Paul Barringer or Ms. Barringer knew about or really understood that these documents gave Ms. Barringer a testamentary power of appointment over voting stock.

Thus, if Paul Barringer knew he was giving Ms. Barringer a testamentary power of appointment in his 1998 documents, he also knew that Ms. Barringer declined to exercise that testamentary power of appointment in her Will executed simultaneously, just as she knew that he declined to exercise the power she gave him. Because Ms. Luzak has produced significant proof that Paul Barringer never made another Will or Trust when he was competent and/or free from improper influence,[47] he thus spent the rest of his cogent un-influenced life[48] understanding that Ms. Barringer had agreed not to exercise that testamentary power of appointment. That understanding between Paul Barringer and Ms. Barringer, evidenced by the 1998 documents, including her specific and express declination to exercise the special testamentary power of appointment, if there was one, serves as evidence in support of all of Ms. Luzak's assertions in addition to there being no intent for Paul Barringer to give Ms. Barringer a power of appointment over voting stock.

The pattern of other planning related acts[49] by Paul Barringer, while competent and free from undue influence, is consistent with the plan set forth in his 1998 estate plan: the voting stock was to be divided equally, thereby denying any one child the ability to control the company. These other acts are consistent with the plan set forth in his 1998 estate plan because

[47] The voluminous and detailed evidence of the invalidity of any post-1998 estate planning documents purportedly executed by Paul Barringer is found in the filings accompanying Plaintiff's Memorandum in Opposition to Merrill U. Barringer's Motion for Summary Judgment of Sept. 28, 2020, pp. 6-12, in the first summary judgment motion (ROA Vol. II, pp. 844-50; Vol. III, pp. 1231-99 and 1339-78; Vol. V, pp. 2042-181 and 2199-206), and also more fully in the filings accompanying Plaintiff's Response in Opposition to Defendant Merrill B. Light's Motion for Summary Judgment filed November 9, 2020 (ROA Vol. V, p. 2308 – Vol. IX, p. 3879).

[48] Meaning that any document he executed after 2011 was invalid because he lacked capacity and was unduly influenced, etc, as to any documents he executed after 2011.

[49] The voluminous and detailed evidence of these other estate planning related acts is found in the filings accompanying Plaintiff's Memorandum in Opposition to Merrill U. Barringer's Motion for Summary Judgment filed Sept. 28, 2020 in the first summary judgment motion and incorporated into Ms. Luzak's response to the second summary judgment motion of Ms. Barringer. (ROA Vol. II, p. 863 – Vol, V, p. 2226; Vol. V, p. 2308 – Vol. IX, p. 3879; and Vol. XI, p. 4601).

in that plan he purportedly gave Ms. Barringer a special testamentary power of appointment while Ms. Barringer concomitantly and simultaneously expressly declined to exercise any power, thereby giving Paul Barringer the assurance that *his* plan for *his* company — shared control after his death — would remain intact.

Although this was the foundation, it is certainly not all of the evidence Ms. Luzak asserts that proves that Ms. Barringer agreed contractually not to exercise any power of appointment; plenty of other evidence exists to prove the existence of an agreement.

Attorney John Jolley prepared the documents and Ms. Barringer executed reciprocal documents multiple times between 2012 and Paul Barringer's death. Importantly, none of the documents prepared by Jolley and executed by Ms. Barringer exercised any testamentary power of appointment. Ms. Barringer did not purport to execute the power of appointment until after Paul Barringer died *and* the commencement of this action in 2016, when a different attorney began representing her.

Even assuming *arguendo* that the estate planning documents executed by Paul Barringer after 2011 might be valid, Ms. Barringer and Paul Barringer executed estate planning documents at the same time, prepared by the same lawyer (Jolley), similar to each other, and symbiotic. Not once during Paul Barringer's lifetime did Ms. Barringer attempt to exercise any testamentary power of appointment.

The pattern of other planning related acts by Paul Barringer while competent and free from undue influence, is consistent with the plan set forth in his 1998 estate plan: the voting stock was to be divided equally among the three children, thereby denying any one child the ability to control the company. That is indisputably the way the company operated when Paul Barringer was alive and competent, and serves as evidence of his intent going forward. These

other acts are consistent with the plan set forth in his 1998 estate plan because in that plan he purportedly gave Ms. Barringer a special testamentary power of appointment while Ms. Barringer concomitantly and simultaneously expressly declined to exercise any power, thereby giving Paul Barringer the assurance that his plan for his company — shared control after his death — would remain intact.

South Carolina Code § 62-2-701 provides several methods of establishing a contract not to revoke a Will or devise: "by (1) provisions of a Will of the decedent stating material provisions of the contract; (2) an express reference in a Will of the decedent to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract and extrinsic evidence proving the terms of the contract."

Assuming arguendo that Ms. Luzak relies solely on the existence of a contract not to revoke a Will or devise — which she does not — any of these three methods listed in the statute may be used to establish the existence of a contract not to revoke a Will or devise. The first option provides for the decedent's Will stating material provisions of the contract. That option does not require that the entire contract be contained in the decedent's Will, but rather only that the Will state material provisions of the contract. Paul Barringer's 1998 Revocable Trust executed in conjunction with his 1998 Will stated material provisions as to the existence of a power of appointment and the intent to treat their children equally. Ms. Barringer's 1998 Will, executed simultaneously and symbiotically with Paul Barringer's 1998 Will and Revocable Trust, stated material provisions as to the existence of a power of appointment and the intent to treat their children equally, as well as, importantly, expressly and specifically declining to exercise the power of appointment set forth in Paul Barringer's estate plan.

Paul Barringer similarly expressly and specifically declined to exercise the power of appointment set forth in Ms. Barringer's estate plan. Although these Barringer 1998 estate planning documents should be read together because they were prepared by the same lawyer representing both of them and executed together, it is Ms. Barringer's Will that should not be revoked as to the express and specific declination to exercise any power of appointment: her Will states the material provisions of the contract in itself, and is corroborated by the material provisions stated in Paul Barringer's Will. The mutuality of the contract is confirmed by Paul Barringer's Will, which declines to exercise the special testamentary power of appointment that Ms. Barringer gave him in her 1998 Revocable Trust.

If Paul Barringer understood what a power of appointment was and he understood that his 1998 Revocable Trust gave that power to Ms. Barringer, then he also understood that Ms. Barringer had agreed at the same time, in documents prepared by the same lawyer representing them both and executed at the same time, not to exercise that power of appointment, just as he declined to exercise the power of appointment she apparently gave him. He relied on that contract. These documents each treat the children equally.

The material provisions of the contract stated in the Barringers' 1998 estate plans, and particularly in Ms. Barringer's 1998 Will, are sufficient to satisfy the requirements of S.C. Code section 62-2-701(1), but are also augmented and corroborated by the following:

- The pattern of the reciprocal Wills and Trusts executed by Paul Barringer and Ms. Barringer beginning in 2012 (although Ms. Luzak contends Paul Barringer's Wills and Trusts are invalid), none of which exercised any power of appointment, until Ms. Barringer breached the contract by executing Wills after Paul Barringer died which purport to exercise a power of appointment;

- Family agreements demonstrating Paul Barringer's intent to keep voting control equal;
- Gift tax returns joined in by Ms. Barringer;
- Corporate documents demonstrating Paul Barringer's intent to keep voting control equal;
- Communications among the family and with advisors; and
- Numerous meetings involving family and business planning, at which Paul Barringer expressed his intent for equal control, which was never disputed, or even commented upon, by Ms. Barringer. These documents and events form a consistent and continuing pattern of evidence.[50]

South Carolina Code §62-2-701(3) provides different requirements: "a writing signed by the decedent evidencing the contract and extrinsic evidence proving the terms of the contract." Under subsection (3), a contract can be established by the signature of the decedent on a writing evidencing a contract as augmented by extrinsic evidence. Thus, subsection (3) broadly and effectively allows the terms of the contract to be established by extrinsic evidence. Just as with subsection (1), there is no requirement that the Will (subsection (1)) or the signed writing (subsection (3)) expressly and specifically include the term "contract." This is consistent with contract law, which of course does not require the word "contract" in a writing to create a contract.

The simultaneous and symbiotic 1998 estate planning documents of Paul Barringer and Ms. Barringer are obviously signed writings. As discussed above regarding subsection (1), Paul Barringer and Ms. Barringer's 1998 documents create special testamentary powers of

[50] The voluminous and detailed evidence of these other estate planning related acts is found in the filings accompanying Plaintiff's Memorandum in Opposition to Merrill U. Barringer's Motion for Summary Judgment filed Sept. 28, 2020 in the first summary judgment motion and incorporated into Ms. Luzak's response to the second summary judgment motion of Ms. Barringer. (ROA Vol. II, p. 863 – Vol, V, p. 2226; Vol. V, p. 2308 – Vol. IX, p. 3879; and Vol. XI, p. 4601).

appointment and Ms. Barringer's Will specifically and expressly declines to exercise any power of appointment. This alone "evidences" a contract. Numerous other documents and evidence also serve as signed writings evidencing a contract and as extrinsic evidence establishing the contract, especially as to equal treatment. [51]

Presumably in the context of section 62-2-701(1), the trial judge held that Ms. Luzak has identified no provision stating the material provisions of a contract. As discussed above, the 1998 estate planning documents clearly set forth the material provisions of the contract: in short, the mutual declination of the powers of appointment that each granted to the other and the mutual and mirror provisions otherwise in their 1998 documents — treating the children equally. Although not necessary because these documents themselves provide the basis for the "material provisions of the contract," section 62-2-701(1) does not preclude additional evidence. As discussed above, there is substantial additional evidence to show the continuing agreement between Paul Barringer and Ms. Barringer.

Presumably in the context of section 62-2-701(3), Judge Bonds held that Ms. Luzak had failed to identify *any writing* signed by Paul Barringer and Ms. Barringer evidencing an alleged contract. Again, as discussed above, Ms. Luzak alleges numerous writings, including but not limited to the 1998 documents, but in addition to writings, other evidence as well. Moreover, section 62-2-701(3) does not limit the use of extrinsic evidence to prove the contract. In addition to documentary evidence, Ms. Luzak has produced testimony, including affidavits, showing their intent. Judge Bonds generally focuses on "Mr. and Mrs. Barringer's estate planning documents,"

[51] The voluminous and detailed evidence of these documents is found in the filings in the prior summary judgment motion incorporated herein.

overlooking that section 62-2-701(3) allows extrinsic evidence, not limited to estate planning documents, and not even limited to documents.[52]

Yet, *according to the trial judge, not a scintilla of evidence exists* to support the existence of a contract not to revoke/not to exercise any power of appointment over voting stock.

V. THE TRIAL COURT ERRED IN RULING BY SUMMARY JUDGMENT DESPITE THE INABILITY TO OBTAIN TESTIMONY FROM DEFENDANT MERRILL BARRINGER.

Much has been made by Ms. Barringer's counsel as well as by Judge Bonds[53] about her age. While Ms. Luzak (and her counsel) wish her nothing but the best physical and mental health for a long time, Ms. Barringer has chosen never to testify about the power of appointment issue. Ms. Barringer's counsel cut short her deposition in March 2019, after Ms. Luzak had just short of three hours to depose her.[54] Ms. Barringer resisted a court order until finally obeying the order to produce her estate planning documents, which she did not produce, despite the court order, until March 6, 2020, some 17 months after the discovery request and approximately one year after her deposition. Her estate planning documents provided crucial information about the power of appointment issue. Because of the refusal to produce these documents, Ms. Luzak did not have access to them at Ms. Barringer's deposition, which was noticed by Defendants and conducted in 2019 before Ms. Luzak received these documents. Ms. Barringer, whom you would think would have something to say about the power of appointment issue, failed to

[52] With respect to the contract claim, Judge Bonds also focuses on the 1998 documents as never promising not to exercise any power of appointment, but, again, section 62-2-701(3) does not limit evidence to Wills, even though the 1998 documents themselves contain sufficient evidence to show a contract under subsections (1) or (3). In addition, the court cites the provision in section 62-2-701 that mutual Wills do not create a presumption of a contract, but that provision does not preclude mutual Wills from creating a contract, especially when supported by other evidence.

[53] See, *e.g.*, (ROA Vol. XVII, pp. 7462, lines 13-15, 7465, lines 2-7 and 7486, lines 13-17).

[54] The substantive amount of time was considerably less, given the constant and lengthy objections interposed by defense counsel.

provide any affidavit, including for this summary judgment.[55] Because an appeal is now Ms. Luzak's sole recourse on this issue, the opportunity to hear from Ms. Barringer as to this issue is lessened.[56] Moreover, Judge Bonds issued his order without determining which estate planning document, if any, was valid and whether that valid document effectively created a power of appointment. Ms. Luzak has been deprived of her opportunity to present evidence about the validity of any estate planning documents, which is crucial to the case.

CONCLUSION

Substantial and sufficient evidence exists, through the pleadings, depositions, affidavits, and discovery on file, such that Ms. Luzak must prevail. Ms. Luzak demonstrates substantial and sufficient evidence of a contract not to revoke, an express promise not to revoke arising from a fiduciary and confidential relationship, an implied promise not to revoke arising from a fiduciary and confidential relationship, and equitable estoppel.

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[55] See note 37, *supra*.

[56] Although Ms. Luzak did not want to have two lengthy repetitive trials, which is why she opposed bifurcation (Pl. MTR Order to Bifurcate, p. 12), she does want her day in court, which because of the summary judgment orders will be delayed even more.

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May 25, 2022

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
ROBERT BONDS, CIRCUIT COURT JUDGE

Appellate Case No. 2021-001337

IN THE MATTER OF: Estate of Paul Brandon Barringer II

Hampton Barringer Luzak, ...Appellant,

v.

Merrill U. Barringer, ...Respondent,

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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